Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

REPLY COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits its reply to comments filed November 8, 1993 in the above-referenced docket.

In its comments, USTA urged the Commission to interpret the statute so as to recognize the intent of Congress to provide for the balanced regulatory treatment of mobile services. In order to fulfill that Congressional intent, USTA recommended that the Commission adopt a broad definition of commercial mobile service in order to ensure that competing mobile services are classified as commercial and are regulated in the same manner. While the majority of commenting parties agreed, USTA will address several comments which advocated a narrow interpretation of the statutory definitions or which sought to create loopholes in order to preserve current regulatory advantages.

I. SERVICE PROVIDED "FOR PROFIT".

USTA recommended that the Commission interpret "for profit" to mean any service which is provided to an unaffiliated entity

and for which compensation is received.[1] Some parties suggested that service providers that are not principally engaged in providing "for profit" services or only provide such services on an ancillary basis should be considered private.[2] This amounts to a distinction without a difference. Such services will compete with other commercial services even if they are not the principal service offered by the licensee. Such a narrow interpretation would simply continue the effect of the current rules which allow private operators to sell excess capacity to the public in direct competition with common carrier providers, free of common carrier regulation.[3] The statute was enacted to correct that type of regulatory inequity, not to perpetuate it.

Likewise, the management of communications systems by paid managers should also be considered to be "for profit" services.[4] Subscribers to such systems pay charges which exceed the costs of providing or sharing services. The Commission should not create a loophole for such systems.

Finally, one party suggested that a service offered at a loss or at a break-even point should be considered private.[5] Whether or not a service actually makes a profit should not be determinative of how the service should be classified. Some new

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[1]USTA at 3.

[2]NABER at 7, Motorola at 7.

[3]Bell Atlantic at 7.

[4]Motorola at 7.

[5]Rockwell at 2.

mobile services may not make a profit initially. If the service provider receives any compensation, or offers the service with the intent to receive compensation, the service should be classified as commercial.

II. INTERCONNECTED SERVICE.

Nearly all commenters agreed that there is a distinction between physically interconnected and providing interconnected service. However, some sought to distinguish between direct and indirect interconnection.[6] Any means used by a service provider to make interconnected service available should be included in the definition of commercial mobile service. It is irrelevant whether the service provider itself provides or controls the interconnection. A service provider should not be permitted to avoid classification as commercial by using a third party intermediary, by acting as an ordering agent or by sponsoring a subscriber's interconnection cooperative.[7]

III. EFFECTIVELY AVAILABLE TO A SUBSTANTIAL PORTION OF THE PUBLIC.

Many of the commenters agreed with USTA that limited eligibility licensees should not automatically be excluded from classification as a commercial mobile service. If such services meet the statutory definition, they should be classified as

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[6]Ram Mobile Data at 4.

[7]BellSouth at 9.

commercial. Many commenters also agreed that system capacity and service area size should not be factors in determining if a service is effectively available to a substantial portion of the public, with a few exceptions.

For example, the District of Columbia PSC suggested that if a service does not reach a Standard Metropolitan Statistical Area and does not employ frequency reuse, the service should be private.[8] Such a restrictive interpretation would severely limit the definition of commercial mobile service, contrary to Congressional intent. If broadly applied, this interpretation would define the services offered by many small telephone companies as private.

Factors such as system capacity and service area size and location should not be used to determine whether a service is effectively available to a substantial portion of the public.[9] These factors do not have a significant effect on public availability and, as evidenced above, cannot be effectively applied.

IV. FUNCTIONAL EQUIVALENCE.

It is clear that the statute intended to incorporate the functional equivalence test to broaden rather than to limit the number of commercial mobile service providers. The Conference Report specifically states that "the definition of private mobile

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[8]District of Columbia PSC at 6.

[9]Pacific Bell and Nevada Bell at 8-9.

service is amended to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service..."[10] The majority of parties support this interpretation.

Time Warner suggested that the Commission interpret the functional language in a manner that will support a broad definition of private mobile service.[11] According to Time Warner this will allow PCS to be regulated as private and allow such licensees to better meet the demands of the marketplace. As noted above, the intent of the statute is to eliminate the regulatory advantage enjoyed by some private licensees. The Commission should not perpetuate this advantage, particularly in regulating new PCS services. Competitive mobile service providers should compete on an equal footing for the opportunity to address marketplace demands.

While Motorola argued that frequency reuse techniques are appropriate factors to use in classifying mobile services as commercial,[12] its comments also stated that the Commission should not constrain private licensees from utilizing such techniques.[13] While USTA agrees that private licensees should be able to use frequency reuse techniques, the service must be

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[10]H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993) at 496. [Conference Report].

[11]Time Warner at 6.

[12]Motorola at 10.

[13]Id. at 11.

examined in light of the statute to determine if it is commercial or private. Particular frequency reuse techniques should not determine if a service is commercial or private and neither frequency reuse nor service area size are appropriate for determining functional equivalence. A service can be classified as commercial even if it does not employ frequency reuse techniques or cover a wide area. Since commercial services themselves do not require these attributes, their functional equivalents should not require them.[14]

V. DISPARATE TREATMENT OF COMMERCIAL MOBILE SERVICES.

As noted above, the intent of Congress in enacting this statute was to eliminate the disparate regulatory treatment of mobile services. Therefore, the Commission should not place undue regulatory burdens on exchange carrier provision of commercial mobile services by requiring the creation of separate subsidiaries or other unnecessary safeguards, as was suggested by some commenting parties.[15]

The Commission has already determined that separate subsidiaries are not in the public interest and should not be used to deny a firm's ability to utilize economies of scope in the provision of telecommunications services.[16] In addition,

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[14]Southwestern Bell at 14.

[15]Comcast at 12-14 and Cox Enterprises at 6.

[16]Computer III Remand Proceedings, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (1991); appeal pending sub. nom., California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14,

the Commission has decided that exchange carrier provision of PCS will not require the establishment of separate subsidiaries.[17] In order to provide regulatory parity in the provision of commercial mobile services, the Commission should eliminate other regulatory barriers currently imposed on exchange carriers, including the structural separation requirements on BOC provision of cellular service, the prohibition on common carrier provision of dispatch service and the eligibility restrictions on SMR licenses.[18] The Commission should remove any regulation which facilitates disparate treatment of some commercial mobile service providers if it hopes to encourage the potential public interest benefits which can be realized in a competitive mobile service marketplace.

VI. INTERCONNECTION.

As USTA stated in its comments, exchange carriers already provide non-discriminatory interconnection, as specified in current Commission rules. The record in this proceeding does not support unbundling of any aspect of the exchange carrier network.[19] Issues surrounding the unbundling of access should not be determined within the context of a proceeding designed to

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1992).

[17]Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, released October 22, 1993 at ¶ 126.

[18]Southwestern Bell at 21-25, Ameritech at 4-10.

[19]Comcast at 5.

balance regulatory treatment of mobile services.

VII. CONCLUSION.

USTA urges the Commission to refrain from creating loopholes which will increase the regulatory advantages of some mobile service providers. The Commission should interpret the statute so as to balance regulatory treatment of such services by broadening the definition of commercial mobile service.

Respectfully submitted,

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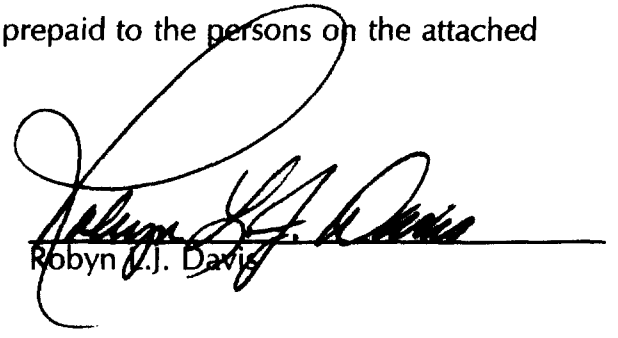
November 23, 1993

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on November 23, 1993 copies of the Reply Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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